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APPENDIX TO PETITIONER'S BRIEF

In the United States Court of Appeals
For the Fifth Circuit

No. 13111

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ALABAMA MARBLE COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

U. S. COURT OF APPEALS
FILED
APR 6 1950
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General Counsel's Exhibits:

Exhibit 2—Separation Notice of Charles T. Adair. Received in evidence at page 6. Photostatic copy bound in opposite 32

Excerpts from Exhibit 6—Agreement, made November 7, 1946, between Alabama Marble Company and International Association of Marble, Slate & Stone Polishers, Rubbers & Sawyers, Tile & Marble Setters Helpers, and Terrazzo Workers Helpers, A. F. of L. Received in evidence at page 14. Printed at 33

Respondent's Exhibits:

Exhibit 18—Statement of C. W. O'Neal, dated October 13, 1947. Received in evidence at page 21. Printed at 34

Exhibit 19—Statement of A. J. Carden, dated October 13, 1947. Received in evidence at page 21. Printed at 35

Exhibit 20—Statement of E. I. Dison, dated October 13, 1947. Received in evidence at page 21. Printed at 35

Exhibit 21—Statement of W. C. Kinser, dated October 13, 1947. Received in evidence at page 22. Printed at 36

Exhibit 22—Statement of J. W. Green, dated October 13, 1947. Received in evidence at page 22. Printed at 36

[1] Before the National Labor Relations Board
Tenth Region

In the Matter of ALABAMA MARBLE COMPANY and CHARLES T. ADAIR, An Individual	Case No. 10-CA-86
ALABAMA MARBLE COMPANY and W. A. WILSON, An Individual	Case No. 10-CA-87
ALABAMA MARBLE COMPANY and W. A. ADAMS, An Individual	Case No. 10-CA-88
ALABAMA MARBLE COMPANY and C. M. KINSER, An Individual	Case No. 10-CA-93
ALABAMA MARBLE COMPANY and LOCAL NUMBER 133, INTERNATIONAL ASSOCIATION OF MARBLE, SLATE AND STONE POLISHERS, RUBBERS AND SAWYERS, TILE AND MARBLE SETTERS HELPERS AND TERRAZZO WORKERS HELPERS, A.F.L.	Case No. 10-CA-185

[2]

Courtroom,
County Courthouse,
Talladega, Alabama,
Tuesday, June 8, 1948.

Pursuant to notice, the above-entitled matter came on for hearing at 10: a. m.

Before: SIDNEY L. FEILER, Trial Examiner.

APPEARANCES:

WILLIAM M. PATE, ESQ., 701 Atlanta National Building, Atlanta 3, Georgia, appearing on behalf of General Counsel.

JOHN J. SMITH, ESQ.,	702 First National Building, Birmingham, Alabama.
C. W. STRINGER, ESQ.,	Talladega, Alabama, appearing on behalf of Alabama Marble Company, the Respondent.
WALTER L. MITCHELL,	Organizer, A. F. of L., Representative, A. F. of L. and International Union, 417½ North 21st Street, Birmingham, Alabama.
B. C. MITCHELL,	International Representative of International Union, Post Office Box 203, Childersburg, Alabama, appearing on behalf of Local Number 133, International Association ot Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Workers Helpers, A. F. of L., the Charging Party.

* * *

[149] CHARLES T. ADAIR, [150] a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner FEILER: Be seated.

Direct Examination.

* * *

[151] Q. What was the last job that you had with the Alabama Marble Company? A. Checker and inspector.

* * *

[152] (By Mr. PATE) Who was your immediate supervisor? A. Mr. George Warren.

Q. And what part of the plant or Company's operations was he over? A. Finishing.

Q. Finishing department? A. Yes, sir.

* * *

[153] Q. At any time while you were working with the Company did a labor organization make an effort, to your knowledge, to organize employees? A. I don't believe I follow you; just that point.

Trial Examiner FEILER: Read the question back for the witness.

(Last question read.)

A. Well, American Federation of Labor did.

Q. (By Mr. PATE) When did that happen? A. I don't remember—I don't remember the exact date, but it was in '46.

Q. Did you join that organization yourself? A. Yes, sir.

Q. About when did you join? A. It was the early part of September, in '46.

Q. At any time after that was there a local union formed of the employees at the plant? A. Yes, sir. Local 133.

• • •

[154] Q. Did you ever have any office in it? A. Secretary, for—and Treasurer, but I was Treasurer a good while before I was made Secretary.

Q. When did you first become Treasurer? A. When it was established.

Q. Were you the first Treasurer? A. Yes, sir.

Q. How long did you continue to hold that position? A. Until the first of January, 1948.

• • •

[155] (By Mr. PATE) Did you become Secretary or Treasurer first, Mr. Adair? A. Treasurer. When the organization was established.

Q. That was in 1946. A. Yes, sir.

Q. And I believe you stated that you became Secretary some time in 1947? A. Yes, sir.

• • •

[157] Q. Did you report to the plant for work on October 6, 1947? A. Yes, sir.

Q. What time did you go to the plant? A. Well, it was—oh, about 7:15.

Q. Was that in the morning? A. Yes, sir.

Q. Was that the time you usually went? A. Yes, sir.

Q. Will you tell us just what you saw happen there after you reached the plant? A. Well, my foreman, Mr. Warren, called me and hands me a letter and tells me to read it. Upon reading the letter I discover that six—nine; pardon me; nine men of the hand-polishing department have been discharged.

• • •

[158] Q. Did you have any conversation with Mr. Warren then? A. Yes, sir.

Q. Where were you and Mr. Warren at that time? A. At the checker's desk.

Q. Was anyone else present there? A. No, sir.

Q. Will you tell what he said and what you said?

* * *

[158] A. I asked him, Did he know what trouble this might cause, and he says, "I think I do."

I told him, I says, "Kind of an unusual thing at the Ala-[159] bama Marble Company for nine men to be suddenly discharged without a notice of being discharged."

He says, "Well," he says, "there's nothing I can do about it," and he tells me to tell the men as they come in not to punch the clock but to come to his office, and the ones that I did see, well, I told them, but I didn't see them all.

Q. (By Mr. PATE) Was that the end of your conversation with Mr. Warren? A. Yes, sir. He immediately went to his office.

Q. Did you see some of the men? A. Yes, sir.

Q. Did you give them the instructions that Mr. Warren told you to? A. Yes, sir.

Q. Will you tell, then, just what else transpired that morning that you saw? A. Well, the word got around pretty rapidly. There was a great confusion and the men begin to gather. Seemed to be a great interest all of a sudden and it was automatically agreed to—that there wouldn't anybody work until it was settled, or something done about it.

Q. Where was that agreement made? A. Just in the finishing plant, there.

Q. Who was present in the finishing plant? A. Well, there was Douglas Robinson, my brother, Houser, [160] Ellison—that's A. F. Ellison—and a great deal of the finishing plant was present at that time.

Q. Was any kind of meeting of a Union committee held that morning? A. Not right then, but I did go—made it my point to go and see if I could get the committee. I went for Mr. Kirk.

Q. Was Mr. Kirk a member of the committee? A. Yes, sir.

Q. Was that Joe Kirk? A. Joe Kirk. And—

Q. Did you get any of the others? A. I went for Mr. Wilson.

Q. Is that Mr. W. A. Wilson? A. Yes; W. A. Wilson.

But I didn't see either one of the men at that time, but I left word at their place what had happened, and for them to come over in the finishing plant, and they did come over later.

Q. Did any of the other committeemen come? A. Well, Robinson was a committeeman. He was already there. H. D. Robinson. So the committee gathers with a majority of the finishing plant. W. P. Harrison, Jr. comes along and calls me and says, "We want to get this straightened out."

I says, "Well, I do, too," and—

Q. And who is W. P. Harrison, Jr.? A. Well, now, I understand he is foreman of the shop, but at [161] that time I don't know exactly the position of his job. But he was looking after the marble that was going out being shipped.

Q. Is his father with the Company, too? A. Yes, sir.

Q. Do you know his father's position? A. I don't know exactly what his position is, but he is one of the stockholders. I can't give you exactly—

Q. All right. Go ahead and tell us exactly what happened from that point? A. I suggested to he, Mr. Harrison, that he go and get Mr. King; bring him down and see if we couldn't come to some agreement before any trouble would arise. He said he would, and he left immediately, but he didn't return. So everyone just agreed to quit.

* * *

[176] Mr. PATE: I will ask that the Reporter mark as General Counsel's Exhibit 2 for identification this paper that purports to be the separation notice of Charles T. Adair.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

[177] (By Mr. PATE) I hand you General Counsel's Exhibit 2 for identification and ask you if you recognize that paper? A. Yes.

Q. What is that? A. That's the discharge paper that I received Thursday morning, following the Wednesday night meeting.

Q. Is that the one that Mr. Warren gave you? A. Yes, sir.

Mr. PATE: I will offer General Counsel's Exhibit 2 in evidence.

Trial Examiner FEILER: Is there any objection?

Mr. SMITH: No objection.

Trial Examiner FEILER: There being no objection, General Counsel's Exhibit 2 for identification is received in evidence.

(The document heretofore marked General Counsel's Exhibit 2 for identification was received in evidence.)

* * *

[242] Mr. SMITH: Mr. Examiner, counsel for the Government and counsel for the Respondent have had a conference and agreed to stipulate as follows: That on Monday, October 6, 1947, there was a complete work stoppage in the production operations of Alabama Marble Company, the Respondent in this hearing. There is no stipulation as to the legal effect of the facts so stipulated. The legal effect of the facts will be left with the Trial Examiner for his consideration and ruling.

Mr. PATE: We will so stipulate.

* * *

[352] C. M. KINSER a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[353] Q. What was your last job with the Company? A. Derrick operator.

Q. How long were you on that particular job? A. Well, continuously.

Q. You mean during this last period that you worked for the Company? A. Uh-huh.

Q. During that time did you ever join the Union? A. Yes.

Q. When did you join? A. Well, I went in as a charter member. I was one of the first to get in there.

Q. That was back in 1946? A. Yeh. September, the best I remember, of 1946.

[354] Q. Did you ever have an office of any kind in the Local? A. Yes. I was elected president of the Union the first meeting that was held.

Q. Was that back about September of 1946, also? A. Yes, it was the latter part of August, or first part of September, one.

Q. How long did you continue to hold that office? A. Up until some time in December, 1948—'47.

Q. '47. A. Yes, sir. Just before Christmas.

Q. During the time that you worked there was there any kind of work stoppage or a strike, that you remember? A. Yes. There was, I would call it a—just a work stoppage, because—

Q. When did that occur? A. That was in September 6th, I think.

Q. September the 6th, did you say? A. Wait a minute. Let's see. October. October the 6th.

Q. What year? A. The past year; '47.

Q. Did you go to the plant to go to work on that day? A. I did go to work that day.

Q. What time did you go to the plant? A. The usual time. 7:30.

Q. And how long did you work? [355] I guess I worked about 30 minutes.

Q. Well, at that time what happened that caused to stop work? A. Well, I think it was the Hosey boy that came up and told me—well, I noticed the air was getting weak and he come up there and told me they had trouble in the finishing department.

You see, I was in the quarry, a half a mile or so from the finishing department, and he told me that they had had some trouble down there of some kind and to come down there immediately and so I go and notify the supervisor on the job and start there and left the quarry continue working until we get it straightened out, and continue work, so when I got down there, I guess the entire shop was in a huddle. • • •

• • •

[356] A. Well, I asked them what the trouble was and they just told me that nine men had been discharged, so I don't remember just who I was addressing directly. They were just all around there. And they told me—I asked them why, and they said because they stayed at home the afternoon before to listen to a ball game and—

• • •

[357] A. I asked them, I said, "This is the first I have known of any trouble brewing," and I said they should go back to work and handle it as a grievance, or have a special meeting and conduct it like you did on May—June the 6th, when we were refused a raise. • • •

• • •

Trial Examiner FEILER: You got to the point in your testimony where you said, and I am summarizing it, that

the men should go back to work and handle the matter, I think you said as a grievance, or a special meeting; is that what you said?

* * *

[358] A. —and so they told me No. To go back to the quarry.

Trial Examiner FEILER: Go ahead.

A. And asked me if the quarry was still running and I said Yes, and since there was a majority present, and all was of the same opinion that I should return to the quarry and shut it down, which I did.

* * *

[359] Trial Examiner FEILER: * * *

You are up to the point in your testimony where you said, in substance, that you and the men in the quarry returned to the finishing department. You remember that part of your testimony. Now will you continue from there, as best you can, and tell us just what happened and what was said, there, in the order, and again without explanatory material. That's for counsel, later. What happened, or what was happening when you got back to the finishing department, and what did you do?

A. Well, there was different groups. They weren't all in one [360] single group. There were several groups scattered around and I got most of them I could together and told them that we would do what we could to get it—to get everybody back to work as soon as we could, and that there was some of them that lived out a way from their job that wanted to know what they should do; whether to hang around the rest of the day or go home; so as president of the Union I told all those that lived out of town to go home but be sure to return to work the next morning.

* * *

[372] Cross Examination.

* * *

[387] Q. All right. Now what other conversation took place between you and the three committeemen, A. F. Ellison, Douglas Robinson, and "And" Wilson on this occasion when you first entered the finishing plant from the southwest door thereof? A. Well, I suggested they return to their jobs and—

* * *

[388] Q. Well now, let me ask you this: Did you and the committeemen and the stewards constitute the officials of the Union? A. Yes.

Q. What decision did you and the committeemen and the stewards reach? A. Well, we reached the decision of the majority.

Q. What was your decision? A. Mine? I am not even allowed to vote, nor even make a decision.

Q. All right. What was the collective decision of the committeemen and yourself and the other officers of the Union on this occasion; namely, October 6, 1947? A. For me to go back to the quarry and shut her down. Of course, it was already shut down because there was no air.

Q. All right. Now then, the committeemen and the officers of the Union and the stewards agreed that you were to go shut [389] down the plant? A. Yes.

Q. To shut down the quarry; excuse me. A. The quarry.

Q. And you men, as officers and committeemen and stewards of this Union, reached this decision independently and on your own, didn't you? A. No.

Q. How did you reach it? A. Through the voice of the majority.

Q. Did you have a Union meeting there? A. I guess you would call it. It wasn't a special meeting. It was not a regular meeting. It was not posted like we usually did on the bulletin board. They was all there, so I guess you could call it a meeting.

Q. You had a Union meeting there, didn't you? A. There was no one there except Union members.

Q. What occurred in the way of reaching a decision that you were to go back and shut down the quarry? A. Well, just by a raising of hands.

Q. Who put the question to the men? A. I did.

Q. What did you say to them? A. I just asked them if they all felt the same way about it.

• • •

[392] Q. What question did you put to them? Just state it as you stated it to them. A. All right. They wanted me to go back to the quarry and close it down.

Q. You asked the men if they wanted you to go back to the quarry and close it down? A. Yes.

Q. Had anybody asked you to put that question to the men? A. No.

Q. You put it on, as president of the Union, didn't you? A. Yes.

Q. After you had talked with the committeemen? A. Yes.

• • •

[403] Q. Now what did you do after that vote? A. I went back to the quarry.

Q. What did you do when you got up to the quarry? A. I crooked my finger at them; motioned for them to come out.

* * *

[406] Q. Then what happened? What happened? A. They came out.

Q. How many came out? A. All of them.

Q. In the whole quarry? A. In that section.

Q. Did the men in the other section, in all other sections of the quarry, come out? A. Not then. They didn't know it, at that time.

Q. Did you tell anyone to call the other men out? A. Yes.

Q. Who did you tell to call the other men out? A. W. A. Adams.

Q. W. A. Adams. A. W. A. Adams.

[407] Q. What did you tell W. A. Adams regarding the calling out of other men in other parts of the quarry on this occasion? A. He was standing just about where my engine room is, just about halfway between the quarry office and the blacksmith shop, because his air, I guess, had been cut off also, and he was down there and I motioned for him and told him to go to the stiff-leg section—we called it the stiff-leg.

Q. Is that the stiff-leg derrick you referred to? A. Yes.

Q. Was that derrick at that time located about the south end of the same quarry about which you called men out of the north end? A. Yes.

Trial Examiner FEILER: Proceed.

A. I told him to go and call the men out of there, because it was the rule of the majority that we stop everything until we can get some action.

* * *

[459] W. ALDRICH WILSON a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[460] Q. What was your last job with the Company? A. Millwright.

Q. How long had you had that particular job? A. Since '42. I believe.

Q. Did you join the Union when it came into the plant? A. Yes, sir.

Q. About when did you join? A. In October of '46.

Q. Did you at any time hold any kind of office in the Union? A. I was a committeeman.

Q. When did you become a committeeman? A. Let's see. It was—I believe it was March, in '47. I am [461] not sure. It was in '47. I think it was in March.

Q. How long did you continue to be a committeeman? A. Until sometime in December.

Q. Do you remember a work stoppage that occurred about October 6, 1947? A. Yes, sir.

Q. Do you remember that occasion? A. Yes, sir.

Q. Did you come to the plant to go to work on that day? A. Yes, sir.

Q. Did you actually go to work? A. No, sir.

Q. What time did you come to the plant? A. I come down, it was about 7:15.

Q. Will you tell us just what happened after you reached the plant; just what you saw? A. Well, the first I knew about anything was—it was just before 7:30 that morning. Charlie Adair came from the finishing plant over to the sawmill where I worked and told me to come over to the shop. He said they was having some trouble over there. There had been nine men fired. So I went on over.

Q. You went to the shop? A. Yes, I went to the shop.

Q. And just what happened after you reached the shop? [462] A. Well, by that time it was about 7:30. It was about work time. Right about the time I got over there, and there wasn't anything starting up, and somebody come by, I think it was Aubrey Ellison. "Let's go down to Warren's office." Warren was foreman of the finishing plant; he was, then. So I go on down there with him. And they was a bunch in there. I don't know just how many, nor who it was. They was eight or ten, I guess, and Aubrey, he walked in, too, where Mr. Warren was sitting in a chair and he was talking to him. I wasn't right close to him. I don't know just what he was saying to him. One thing I did hear Mr. Warren say to Mr. Aubrey Ellison and he told him that not to blame him with it. He said he had nothing to do with it. Aubrey was one of the fired men and most of the rest were standing right around in there with him.

Q. About what time of day was it when you were there? A. That was 7:30, or maybe four or five minutes after.

Q. How long did you stay there? A. I didn't stay there but just a--just maybe five minutes.

Q. Where did you go when you left? A. We come on

back down through the shop. There was a bunch of us walking along. And on down, and I come on down to the lower door, to the southwest door, and I come on back over to the sawmill; back over there where I worked.

Q. You went on to the sawmill? [463] A. I come on back to the place where I worked, after that.

Q. And what happened, if anything, after you reached the sawmill? A. When I got into the lower end of the mill, up there, I could see the fellows up there ganged up. Five or six—five, I believe it was, that works in there—and I walked up there and I told them, I says, "Well, nobody's working over there; everything's down."

One guy spoke up and said, "Let's strike, too, then."

I said, "I'll shut them down and go over there with them," so they stopped the mill. They had started up, over there.

* * *

[535] WALTER ASROE ADAMS a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[537] Q. (By Mr. PATE) What was your last job with the Company? A. Well, they had me rated as blacksmith.

* * *

[542] Q. (By Mr. PATE) I believe, Mr. Adams, that you were saying something about meeting Bill Kinser; is that correct? A. Yes, sir.

Q. Where did you see him? A. He was on the railroad track, about 30 yards, I would say, up above the little old quarry office; south of it.

Q. Who is "he"? A. He is as sub-foreman under J. M. Kinser.

Q. Under J. M. Kinser? A. Yes, sir.

Q. Well, what happened after you saw Bill Kinser? A. These other fellows come on up the road, there, Douglas Robinson and Aubrey Ellison, Cecil Kinser; they walked up where we was all talking.

Q. And were you then with J. E. Hendricks, too? You mentioned him? A. Yes, sir; he was there.

Q. And just what conversation did you have there? A. There wasn't any more, after they come up and told me to call them out of the quarry. Some one of them three did. I [543] don't know which one it was.

Q. Some one of the three, you say? A. Yes, sir. That come up there.

Q. Who were the three? A. Aubrey Ellison and Cecil Kinser and Douglas Robinson.

Q. Then after they told you that, or one of them told you that, what did you do? A. I went out there and hollered. Told them what they said.

Q. Who did you holler to? A. Well, all I saw was the man that run the broachers. They were standing up, all standing up there talking in a bunch. They didn't have any air.

Q. What part of the plant was that that you went to? A. That was the south end of the quarry, up where that stiff-leg derrick is.

Q. What did you say to the men when you went there? A. I just hollered and said, "They said come out".

• • •

[804] WALTER L. MITCHELL, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (By Mr. PATE) Mr. Mitchell, will you give us your full name and address, please? A. Walter L. Mitchell, 417½ North 21st Street, Birmingham 3, Alabama.

Q. What is your occupation? A. I am Organizer for the American Federation of Labor.

• • •

Q. Did you ever do any work among the employees of Alabama [805] Marble Company? A. Yes, sir, I did.

Q. When did you first do that? A. In the Summer of 1946.

Q. What work did you do there? A. Organized people in the Sylacauga area and at that time contacted the employees of Alabama Marble Company, signed them up into our union and requested recognition, etc.

• • •

[807] Q. (By Mr. PATE) Well, after Local 133 was formed, were there any negotiations to your knowledge with the Company concerning the contracts? A. Yes, sir, negotiations were entered into and a contract was concluded.

Q. Did you participate in the negotiations? A. I did.

Q. Did you sign the contract? A. I did.

Q. When was that contract executed? A. November 7, 1946.

Mr. PATE: I will ask that this document, purporting to be [808] a copy of the contract between Alabama Marble Company and the Internation Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Workers Helpers, A. F. of L., be marked as General Counsel's Exhibit No. 6 for identification.

* * *

[809] (The document heretofore marked General Counsel's Exhibit No. 6 for identification was received in evidence.)

* * *

[818] Q. (By Mr. PATE) Mr. Mitchell, do you remember an occasion [819] when there was a work stoppage at the Alabama Marble Company in October of 1947? A. I do.

Q. Did you go to the plant on that date? A. I did.

Q. When did you go there? A. I went in the afternoon. I received a call in the morning from one of the employees, a member of our Union, who requested that I come as soon as possible, and I could not get there until the afternoon. I contacted the Federal Conciliator assigned to the bargaining conference case and told him of the circumstances as I understood them, that there was a work stoppage, that I was not familiar with the details, and asked that he come in, and he and I went to the plant together from Birmingham.

Q. What time of day did you go to the plant? A. It must have been around 3:30 or 4:00 in the afternoon.

* * *

[820] Q. (By Mr. PATE) There was a meeting held some time during that afternoon or evening? A. Yes, sir, there was.

Q. Where was that meeting held? A. The Company's Sales Room.

Q. Did you attend it? A. I did.

Q. Who else was present at that meeting? A. For the Union, W. A. Adams, W. A. Wilson, Joe Kirk, Aubrey Ellison, and Douglas Robinson, and myself.

Q. Was the conciliator present? A. The conciliator was present.

Q. Who was present for the Company? A. Mr. W. M. King, and other Company officials who went in and out of the meeting.

Q. Was Mr. King present during the entire meeting? A. He was.

Q. Can you tell us just what was said and done at that meeting, starting from the time the meeting opened until it ended? [821] A. When I went into the meeting I went in telling Mr. King that I was very sorry for the work stoppage, that I did not know the circumstances or details of it yet, and had not made an investigation, but that the Union would live up to its contract and the Union was not on strike. Mr. King said it was a Union strike, the Union leaders had closed him down. I told him that it was not a Union strike because procedure had not been followed, the strike, if it was a strike, had not been authorized by the Union, that the Union would live up to its contract and order them back to work, that I was very sorry if the leaders had closed them down. He told me that it was costing him a lot of money, and he felt like, or he thought the Union leaders had not been properly trained as to their obligations and responsibilities under the contract. I told him that it was—I was partly to blame and at fault because they had not been properly trained, if they had not been, but part of it was due to the fact we did not have a meeting hall. In any case, Mr. King said it cost him a lot of money.

Q. Was there any further conversation then at the meeting? A. We discussed, and I made the proposition to him, that everybody should return to work the next morning, including the nine hand polishers that were discharged, and that the discharge of the nine hand polishers should be handled as a grievance, and if they were found guilty as charged by the company he could fire them, and in the meantime he would have [822] the advantage of their services, because under the contract if a discharged employee returned to work it would require back pay. Mr. King did not agree with that, and told me everybody could return to work with the exception of the nine discharged employees, that he was ready to go to arbitration with their cases.

I told Mr. King that I did not think it was right to go direct to arbitration, that he personally, as I understood it, had not heard the cases; that I did not know what the facts were and did not believe he did, that I thought the cases should be handled in accordance with the terms of the contract and should be handled as grievances and he should hear those grievances before we went to arbitration. Mr. King agreed with me before we adjourned the meeting that he would hear the grievances, and a meeting was set for Saturday, October 11th, to hear those grievances.

Q. Was any agreement reached as to whether or not the nine men should work in the meantime? A. No. Mr. King refused to allow those men to work, said they would stay discharged, that he would hear the grievances and they would stay discharged until they were charged to the contract grievance procedure or otherwise.

Q. Is that the substance of the entire discussion at the meeting? A. That was the subject of the discussion at the meeting.

[823] Q. Was the grievance meeting you referred to held on the following Saturday? A. It was.

Q. Where was that meeting held? A. The Company's Sales Office.

Q. Who was present at that meeting? A. Present for the Union were W. A. Adams, W. A. Wilson, Joe Kirk, Aubrey Ellison, H. D. Robinson, B. C. Mitchell, David L. Sherer, another organizer, and myself, for the Union. For the Company, Mr. H. M. King, Assistant General Manager, and Mr. John J. Smith, Attorney. Other officials came in and out.

Q. Was the conciliator present at that meeting? A. The conciliator was not present at that meeting.

Q. Will you tell us just what transpired at that meeting from the time it opened until it ended? A. That meeting—it was opened by me with a general statement about what the meeting was about. Mr. Smith, as I remember it, asked that we submit our grievance in writing, and I told Mr. Smith that there had been an agreement on the previous Monday night between Mr. King and me that these grievances would be handled. After some discussion we agreed to proceed.

Q. Did you proceed? A. The Union called in witnesses and examined those witnesses, and allowed cross-examination by the Company through its [824] attorney Mr. John Smith. During the course of the day and the evening we heard testimony from eight discharged employees, and Charles Adair—Charles Adair was the first witness.

* * *

[825] Q. Was the meeting you referred to held on October 15th then the next meeting? A. That was the next meeting.

Q. Did you attend that meeting? A. I did.

Q. Where was it held? A. In the Company's Sales Room.

Q. Who were present at that meeting? A. Present at

that meeting were W. A. Wilson, W. A. Adams, Joe Kirk, H. D. Robinson, C. M. Kinset, B. C. Mitchell, and myself. Aubrey Ellison came in late at that meeting. His mother was ill at the hospital and he came in late in the meeting. That is for the Union. For the Company, H. M. King, Assistant General Manager, and John J. Smith, Attorney—

* * *

[831] Q. Did you yourself have anything further to say, or anyone else present? A. I answered Mr. King by saying that I was the spokesman for the Union, the Union was the collective bargaining agent, and, speaking for the Union and the nine individual hand polishers, that the decision was not satisfactory, that the men would not come to work the next day, that we felt that the thing should be handled in accordance with the terms of the grievance procedure, and that we should submit it to arbitration. * * *

[832] A. We were ready to name our arbitrator and we thought the Company should name theirs. Mr. King stated that the Company was not yet prepared to name its arbitrator, it would have to think it over, and he would let me know. A further meeting was agreed to for October 22nd, to resume the interrupted contract negotiations.

* * *

[903] Mr. SMITH: At the request of counsel for the Government, I wish to say that I am now reading in two documents that counsel for all parties have agreed to as being exchanged by and between Alabama Marble Company and the Union on the night of [904] October 22, 1947 regarding the names of their respective arbitrators, first the notice given by the Union, which appears on stationery bearing the name "American Federation of Labor", shows "Walter L. Mitchell, Organizer, 5235 6th Avenue, South, Birmingham 6, Alabama, October 22, 1947. The International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Workers Helpers, Local 133, hereby names Mr. Hugh W. Brown, 501 Lyric Building, Telephone, 7-3038, Birmingham 3, Alabama, as the arbitrator for the Union in all cases ready for arbitration in accordance with the above Union's contract with the Alabama Marble Company dated November 7, 1946. Walter L. Mitchell".

The Company's notice, given to Mr. Mitchell, was as follows: "October 22, 1947. To Whom it May Concern: Ala-

bama Marble Company hereby names Mr. Lewis Jeffers, Trustees Loan and Discount Company, 2010 Second Avenue North, Birmingham, Alabama, Telephone Number, 3-9231, as its arbitrator to consider the three cases ready for arbitration, as provided in Article 5 of the effective contract between this Company and International Association of Marble Workers", etc., "Alabama Marble Company, by John J. Smith, its Attorney".

* * *

[1180] Re-cross Examination.

* * *

[1182] Q. * * * I understood you to say on direct examination that you received a call during the day to come to Alabama Marble Company, is that correct? A. That is correct.

Q. Who called you? A. One of the Local Union officers.

Q. Who was that officer? A. Charlie Adair, as I remember it.

Q. What did Charlie say to you on that occasion? A. He told me there was a work stoppage, and wanted me to come down as soon as I could.

* * *

[1208] Q. On the night of October 22, 1947, did the parties exchange the names of their respective arbitrator for the handling of certain grievances? A. They did.

Q. What grievances were these arbitrators to handle? A. All cases ready for arbitration.

Q. What cases were then ready for arbitration? A. There were two cases ready for arbitration.

Q. What were they? A. The case of the hand polishers and the case of the watchmen's over-time.

* * *

[1209] Q. Was there any discussion of any other case to be handled by the arbitrators? A. We had discussion of another case, but not any specific discussion to arbitrate that case.

Q. You mean just discussed the merits? A. We had a discussion at the beginning of the meeting of the discharge of four officers and committeemen, in which I told Mr. King and Mr. Smith that the Company had fired those individuals because they refused to allow the nine hand [1210] polishers to go back to work the next day, refused to order them to go back to work, and the Company fired them in an effort to destroy the Union.

Q. Was anything said with reference to those cases with reference to arbitration? A. Not by the Union.

Q. At any time did the parties agree that they would arbitrate the case of the four individuals? A. Not that I recall.

* * *

[1535] JAMES W. GREEN, was thereupon called as a witness for the respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[1536] Q. (By Mr. SMITH) Tell us what you saw and what you heard on that Monday morning, please, sir. Speak out now. A. You mean about the shut down?

Q. Tell us about the shut down? A. I don't know what to say first.

Q. What happened on that Monday morning? A. We shut down the gangs.

Q. Shut down the gangs? A. Yes, sir.

Q. Do you mean the gang saws? A. Yes, sir.

[1537] Q. Did you shut down the gang saws? A. Yes, sir.

Q. Did anybody tell you to shut down the gang saws? A. Yes, sir.

Q. Who told you to shut them down? A. Mr. Aud Wilson.

Q. Mr. Aud Wilson? A. Yes, sir.

Q. Who was present when Mr. Aud Wilson told you that? A. I don't remember whether there was anybody present or not.

Q. What did Aud Wilson say to you, please, sir, on that occasion? A. He just told me to shut the gang down, that they had fired all the hand polishers and to leave them shut down until I heard from him.

* * *

[1564] W. C. KINSER was called as a witness on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[1568] Q. * * * Then what happened? When did you next see Cecil? A. Well, he came back—Mr. Adams was coming down the track from the blacksmith shop.

Q. Now, which Mr. Adams? A. W. A. Adams.

Q. W. A. Adams? A. That is right.

Q. Did he work in the blacksmith shop? A. Yes, sir.

Q. He was coming down from the blacksmith shop? A. From the blacksmith shop.

Q. All right, sir. A. And Cecil told him to go to the stiff leg and call the men out over there.

Q. Where were you standing at the time Cecil told Mr. Adams to go to the stiff leg and call the men out? A. We were by the engine room,—by the engine, and he ran. I was about a third of the way between the little office and [1569] the—between the little office, the clock office and the blacksmith shop.

Q. That was at the quarry? A. That was at the quarry.

Q. All right, sir. After Cecil told Mr. Adams to go down to the stiff leg and call the men out what happened? A. Well, he never did make any stop. He turned around.

Q. Who didn't make any stop? A. Mr. Adams.

Q. All right. Mr. Adams didn't make any stop? A. No.

Q. All right, what happened? A. He immediately turned around and went to the stiff leg and Cecil turned and went to the north end of the quarry and those men were not as deep on the north end as they are on the south end and they came out last.

• • •

[1570] Q. What else happened? A. It wasn't a few minutes then until the men came down from the stiff leg or the south end of the quarry.

Q. Men came out of the south end of the quarry? A. That is right.

Q. Did all the men in the quarry come out? [1571] A. Yes, sir.

Q. How many men came out? A. Well, there was, I will say, between twenty-five and thirty. I don't remember exactly how many men we had at that time; somewhere between twenty-five and thirty.

Q. All right. What happened then on that occasion. A. We stood around there, around the clock. I went on down to the clock. Some of them asked the question should they clock out and I told them "No" and Cecil told them, "Yes, go ahead and clock out".

Q. Your brother told them to clock out? A. That is right. And they clocked out. And he told them to go to the finishing shop, they would go to work.

• • •

[1575] Mr. SMITH: Respondent offers its Exhibits 18 and 19 for identification in evidence at this time.

Mr. PATE: I have no objection.

Trial Examiner FEILER: There being no objection Respondent's Exhibits 18 and 19 are received in evidence.

[1576] (Thereupon, the documents previously marked for identification Respondent's Exhibits Nos. 18 and 19 were received in evidence.)

• • •

[1602] ELLIS IRVIN DISON was called as a witness on behalf of the respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

• • •

[1603] Q. What was your job with Alabama Marble Company in 1947? A. I had charge of the rubbing beds at the time and supervision over the coping and stock that comes out of the mill, sawmill.

Q. Do you remember the one day strike that occurred last year? A. Yes, sir, I do.

• • •

[1604] Q. How long did the rubbing bed men and their helpers work on this occasion? A. I would judge about ten, fifteen minutes; fifteen minutes maybe.

Q. What happened then? A. Well, we was ordered to shut down.

Q. Who told you to shut down? A. Charlie Adair was the first that told me to shut down.

Q. What did he say to you, Mr. Dison? A. He just said they had had some trouble in the shop up there and they would have to shut the face down until they got it settled.

• • •

[1607] Mr. SMITH: Mr. Reporter, I hand you here a notarized instrument dated October 13, 1947, signed by E. I. Dison and ask that you please mark this as Respondent's Exhibit No. 20.

• • •

[1608] (Thereupon the document referred to, previously marked for identification Respondent's Exhibit No. 20, was received in evidence.)

• • •

[1617] Mr. Smith: Mr. Reporter, I ask that you please mark the statement dated October 13, 1947, signed by W. C. Kinser, as Respondent's Exhibit No. 21 for identification.

• • •

[1618] (Thereupon the document above referred to, previously marked for identification Respondent's Exhibit No. 21, was received in evidence.)

• • •

[1620] Mr. Smith: Mr. Reporter, I ask that you please mark as Respondent's Exhibit 22 for identification a statement dated October 13, 1947 signed by J. W. Green.

• • •

[1621] (Thereupon the document above referred to, previously marked for identification Respondent's Exhibit No. 22, was received in evidence.)

• • •

[1631] Houston W. Harris was called as a witness on behalf of respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

• • •

Q. Were you employed by Alabama Marble Company on the occasion that the hand polishers did not report back to work on Friday afternoon, October the 3rd? [1632] A. That is right.

Q. What work were you doing for Alabama Marble Company? What was your job for the Alabama Marble Company at that time? A. I was a hand polisher.

• • •

Q. Tell us what happened during the morning of October the 3rd? A. Was that on a Friday?

Q. Yes, that is on a Friday, the day that the hand polishers did not come back to work for the afternoon work shift. A. Well, I reported to work at 7:30 and I brought a radio in and I had the radio on. Some time in the morning, I would say about 10:30, Mr. Warren come to me and asked me whose radio it was?

• • •

Q. What did you say to him, if anything? A. I told him it was mine. He said Mr. King didn't approve [1633] of the radio being there. If I didn't get it out he would do like he did with Harry King's piccolo. He would throw it out the window.

• • •

Q. All right. What happened then? A. Aubrey Ellison asked me what was the matter? I told him Mr. Warren told me to turn the radio off. And he says, "Well, why didn't Mr. Warren come to me instead of to you"?

Q. That was Aubrey Ellison who said, "Why didn't Mr. Warren come to me instead of to you"? A. Yes, sir.

Q. All right, sir. What did you say to him? A. I said, "I don't know why he didn't".

Q. What happened after that? A. Well, he said, "We should be able to listen to the radio, that it wasn't interfering with our work".

Q. That was Aubrey doing the talking? A. Yes, sir.

Q. All right, sir. A. And I agreed with him and so did the other hand polish- [1634] ers. And then it was agreed among us that we would stay out that afternoon and listen to the ball game.

• • •

[1679] JOHN J. SMITH was called as a witness on behalf of respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

• • •

[1730] Q. Now I wish you would state, Mr. Smith, what was done in regard to the arbitration after this meeting that was held on October 15th. A. If you don't mind I would like to get my notes in my file on arbitration.

Q. Yes. A. I will state to you that I have seen a copy of a letter dated October 16, 1947 sent by Alabama Marble Company over the signature of H. M. King, Assistant General Manager, addressed to the International Association of Marble Workers, and so forth, attention Mr. Walter L. Mitchell, Organizer, Lyric Building, Birmingham, Alabama, which shows that it was sent registered mail, return receipt requested, and which letter in substance says that the company would not be in a position to name an arbitrator by Friday, October 17, 1947 and stating further that the company would correspond with the union as quickly as we have reached a decision in this matter.

Now, then, next, on the 20th day of October 1947, in Birmingham, Alabama I received a call from Mr. Walter Mitchell while I was at my office in the First National Building on First Avenue and Twentieth Street in Birmingham. Mr. Mitchell asked whether the company was ready to name its arbitrator or at that time and said that the union was ready. I told him that the information I had enabled

me to say that the company could [1731] name its arbitrator when the parties met on Wednesday, October 22, 1947 and Mr. Mitchell said to me that the arbitrators named by the union and by the company should handle the grievances of the nine hand polishers and the question of overtime payments to the watchmen and I agreed with him.

Then Mr. Mitchell said to me that the union would like to present on October the 22nd, 1947 the grievances of the four individuals who had been discharged on October 16, 1947. I told Mr. Mitchell that that would be agreeable with the company.

Mr. Mitchell then said to me that if it were necessary the same arbitrators named by the parties on that occasion could handle all of the grievances and he specified the grievances of the nine hand polishers, the grievance involving overtime payments to watchmen and the grievances of the four individuals who had been discharged on October the 16th if it were necessary to take their cases, that is, the cases of the four, to arbitration and I agreed that that would be the manner in which the arbitrators would act.

Q. Give the names of those four individuals that you refer to. A. The four individuals that I refer to were Cecil Kinser, W. A. Adams, W. A. Wilson and—let me check my files for the other one—and Charles T. Adair.

Q. Now, did the company name an arbitrator? A. Yes, sir, the company did name an arbitrator.

Q. Whom did the company name? [1732] A. Louis F. Jeffers.

Q. And did the union name an arbitrator? A. Yes, sir.

Q. Whom did the union name? A. Hugh W. Brown.

Q. What, if anything, was done after these arbitrators were named? A. Well, Mr. Stringer, these arbitrators were named by the parties at their meeting on October 22, 1947 and after that Walter—or while I was in the sales of Alabama Marble Company on October 30, 1947 I stated to Mr. Walter Mitchell that I had heard that Mr. Hugh W. Brown was sick, critically ill and in the Highlands Baptist Hospital in Birmingham, Alabama. Mr. Mitchell told me that my information was correct. I asked him if he knew when Mr. Brown would be out? He told me he did not because he was so critically ill.

I stated to Mr. Mitchell on that occasion of October 30, 1947 that I thought the union should name some other person to act as its arbitrator in place of Mr. Brown due to the illness of Mr. Brown. Mr. Mitchell said he was not ready to name anyone else at that time.

Then following that, on November the 3rd, 1947, I personally wrote a letter to Mr. Walter Mitchell, Organizer, 5235 Sixth Avenue South, Birmingham 6, Alabama, and I wrote as attorney for Alabama Marble Company and I referred to my conver- [1733] sation with him on October the 30th, 1947 and then told him that on that day, November 3rd, I had tried to reach him by telephone and couldn't do so and then I asked him to give me the name, address and telephone number of the individual to act as arbitrator for the unions and suggested that he do it not later than Wednesday, November 5, 1947.

Q. Did you have a reply to that letter? A. I had no reply to that letter.

I next saw Mr. Walter Mitchell in the sales office of Alabama Marble Company at Gantt's Quarry, Alabama, on November the 6th, 1947. On that occasion I asked him if he had the name of another person to act as arbitrator for the union to take Mr. Brown's place. He said he was not ready to name an arbitrator at that time to act instead of and in place of Mr. Brown.

Then on November the 10th, 1947 while in Birmingham, Alabama and from my office I called Mr. Walter L. Mitchell by telephone and asked him if he would please name someone else to act for the union to arbitrate the three matters that were then pending. Mr. Mitchell said to me that the contract had ended, the contract was no longer effective, that it was the union's position that it would not name an arbitrator and that these matters would not be arbitrated.

* * *

[1865] H. M. KING was called as a witness on behalf of respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

* * *

[1873] Q. You have heard testimony, I believe, Mr. King, that there was a general work stoppage at Alabama Marble Company on Monday, October 6, 1947, have you not? A. I have.

Q. Tell us what you know about the events of that day, Monday, October 6, 1947. A. On Monday morning, October the 6th, Bill Harrison came to my home about a quarter of eight—

Trial Examiner FEILER: Excuse me. I just want to remind you of one thing there. There are several juniors and seniors inside the plant.

The WITNESS: Yes.

Trial Examiner FEILER: And make sure whether we understand that you refer to a junior member of the family or not. Would this be Bill Harrison, Sr. or Jr.?

[1874] The WITNESS: Junior.

Trial Examiner FEILER: Junior. All right, I am sorry. You say he came to your home?

The WITNESS: He came to my home about a quarter of eight and said none of the men were at work except those on the rubbing beds; that all of those not at work were crowded around the rubbing beds and it seemed to him that there might be trouble. I told him to go back and tell E. I. Dison, foreman of the rubbing beds, to shut the beds down.

• • •

[1878] Q. (By Mr. SMITH) Now, Mr. King, I believe you testified that you remained at Gantt's Quarry either in your office or at your residence during the day of October 6, 1947 when the [1879] general work stoppage occurred? A. I did.

Q. Tell us what happened on that day. A. About five o'clock in the afternoon Mr. Virgil Finch of the Conciliation and Mediation Service called at my home and asked me if I would come down to the main office and meet him?

Q. And meet him, did you say? A. Yes.

Q. All right. A. I went immediately to the main office and met Mr. Finch.

Q. What happened there between you and Mr. Finch?

• • •

[1880] The WITNESS: I said I would meet with Mr. Mitchell. Mr. Finch said that Mr. Mitchell was at that time down in the finishing plant talking to the men and that as soon as he got in contact with Mr. Mitchell he would let me know. Mr. Finch called me at my home about six o'clock and asked me if I would meet with Mr. Mitchell in fifteen or twenty minutes? I said, "No, I won't meet with Mr. Mitchell in fifteen or twenty minutes, I am about to eat my dinner, but I will meet with Mr. Mitchell at 7:30 in the sales office."

Q. (By Mr. SMITH) Did you meet with Mr. Mitchell that night at 7:30 in the sales office? A. I did meet with Mr. Mitchell and a committee in the sales office. Mr. Finch was there and also Cecil Kinser. On my way to the sales office I went by the Gardners' home and asked R. M. Gardner and

C. O. Gardner to go down with me to the sales office and they were there in the sales office with me at the time we met with Mr. Mitchell and the committeemen and Cecil Kinser.

Q. At that time was Mr. W. H. Runge, Sr., and Mr. W. H. Runge, Jr., available to meet? A. No. They were away.

Q. Were they out of town? A. They were out of town. They were at Hot Springs, Ar- [1881] kansas attending a meeting of the National Association of Marble Dealers.

Q. Now the Gardners, Mr. Charles Gardner and Mr. R. M. Gardner, accompanied you to the sales office when you met with Mr. Virgil Finch, Mr. Walter Mitchell and the union committeemen and Cecil Kinser, is that correct? A. That is correct.

Q. All right. What happened there, please, sir? A. Mr. Mitchell said he was extremely sorry about the way it happened, that if he had been there he believed he could have prevented it; that the American Federation of Labor believed in living up to its agreements; that a strike was unauthorized and was not authorized by the union.

I told Mr. Mitchell that I resented extremely the whole affair. I told him that the men had acted in cold disregard for the welfare and interest of the company, that their acts were those of gross insubordination; that they had defied the company and they had practically thumbed their nose at us and told us to go to hell; that they had violated the contract and that it was time that they should realize what they were doing.

Mr. Mitchell said that he felt that he was partly to blame; that he had been very busy during the year and had not been able on account of that to give as much attention as he would like to have in instructing the men in the per- [1882] formance of the contract and he said he felt that all of them should be lectured and reprimanded.

I told Mr. Mitchell—no. He asked me if I would allow the hand polishers to go back to work the next morning? I said, "No, they were fired and they will stay fired". Mr. Mitchell then asked me if the other men could go back to work the next morning and I said they could.

Mr. Mitchell then asked me to handle the cases of the nine hand polishers as grievances; that he had some information that he was sure I didn't know about and he would like to present to me such information. I said I would listen to what Mr. Mitchell had to say. He asked me if I would meet with him and the committee the next morning? And I said

no, I would not but I would meet with him on Saturday at about eleven o'clock. He said that was agreeable to him.

Then Mr. Mitchell then said that he would like to talk to the men and the two committeemen and Cecil Kinser left the sales office. Mr. Mitchell had also said that he would let me know shortly whether or not the men would go back to work the next morning and then they left the sales office.

Shortly thereafter Mr. Virgil Finch left. I reckon about half past eight Cecil Kinser came into the office and said the men would go back to work in the morning. I said, "All right".

• • •

[1888] Q. Now, Mr. King, I want to ask you what you did during the period of time following the strike on Monday, October 6th and your meeting with representatives of the union on October 15, 1947 in connection with the one day work stoppage that did occur on Monday, October 6th? A. During the latter part of the week of October the 6th I visited the quarry and talked with Bill Kinser and he told me that on the morning of October the 6th when he and Cecil Kinser and Walt Adams and Joe Hendricks and several others were standing by the engine room of the little steel derrick he heard Cecil Kinser tell Walter Adams to go to the stiff leg and call the men out of the quarry. He then saw Walter Adams go toward the stiff leg. He saw Cecil Kinser go to the north end of the quarry and shortly thereafter all the men came out of the quarry.

Q. Did you say anything further to Bill Kinser at that time? A. Yes. I said, "Bill, will you make a statement of what you just told me"? He said he would. I told him then to get a statement from someone in the south end of the quarry who had seen or heard Walter Adams call the men out of the quarry. I told him to get a statement from someone in the north end of the quarry who had seen Cecil Kinser call or wave the men out of the quarry.

[1889] Q. Did you first ask Bill Kinser whether or not he had seen either his brother Cecil Kinser or Walt Adams motion the men out or call them out of the quarry? A. Yes. I asked him if he had seen Walter Adams call any of the men out of the quarry.

Q. What did he say when you asked him that? A. He said he had not.

Q. Did you ask him whether he had seen his brother Cecil Kinser call the men out of the north end of the quarry? A. I did.

Q. What did he say? A. He said he had not seen him.

Q. And then after that you asked him to find out if anyone had seen either Walt Adams or Cecil Kinser call the men out of the quarry, is that correct? A. That is right.

Q. And after you asked Bill Kinser to get that information for you what did he say? A. He said he would.

Q. Did you do anything else during that period of time? A. Yes. In the latter part of the week I also went to see E. I. Dison, foreman of the rubbing beds and asked him what had happened or what had taken place on the morning of October the 6th? He told me that on the morning of October the 6th, shortly after the work whistle had blown, that Charles [1890] Adair came to him and told him he would have to shut the beds down, that there has been some trouble in the plant and they would have to stay down until it was settled. Irving Dison said that he told Charles Adair that he would have to get orders from someone with more authority than he had before he would shut the beds down. He said shortly after that Aubrey Ellison came to him and told him he would have to shut the beds down, that they had had trouble in the plant and he would have to shut the beds down until it was settled.

Dison told me at this time that a great number of the men in the finishing plant had massed around the rubbing beds and that he was fearful of trouble and he shut the beds down. I asked him—

Q. What else did you ask him? A. I asked him if he would sign a statement of what he told me? He said he would.

Q. Did you do anything else during that period of time, Mr. King? A. Yes, sir. During that time or about that time I went to the mill office and talked with W. E. Sorrell, foreman and told him I wanted to find out who had shut the gangs down. I told him to go to the mill and get Dune Green.

Q. Is Dune Green the gentleman that testified here as James W. Green? A. That is right.

[1891] Q. What did James W. Green or Dune Green do for Alabama Marble Company at the time that you are testifying about? A. Dune Green operated on the shift from 7 o'clock until 3, 3:40, 3:30 it generally is.

Trial Examiner FEILER: Counsel's question was what was his job at the plant?

Q. (By Mr. SMITH) What did he do, Mr. King? A. He operated the saws. He had charge of operating the saws.

Q. What sort of saws? A. The gang saws.

Q. Was there anybody else in charge of the gang saws during the shift that he worked? A. There is only one operator on that shift that leads for the gangs.

Q. And that operator was Dunc Green? A. And that operator was Dunc Green.

Q. I believe you said you asked Mr. Sorrell to have Dunc Green come in, is that right? A. That is right.

Q. What happened then? A. I asked Dunc if he had shut the gangs down? He said he had. I asked him who told him to shut them down? He said Aud Wilson had told him to shut the gangs down, that they had some trouble over in the shop and to keep them shut down [1892] until he told him to start them up.

Q. Did you do anything further—did you say anything further to Dunc Green on that occasion? A. I asked Dunc Green if he would sign a statement saying just what he had said? He said he would.

* * *

[1894] Q. (By Mr. Smith) Now, Mr. King, before I show you certain of the company's exhibits that are in evidence I would like to ask you if W. H. Runge, Sr. and Mr. W. P. Harrison, Sr., and R. M. Gardner and yourself are all of the stockholders of Alabama Marble Company? A. That is correct.

Q. Are you four men all of the directors of Alabama Marble Company? A. That is right.

Q. Now, Mr. King, I hand you Respondent's Exhibit 18, Respondent's Exhibit 19, Respondent's Exhibit 20, Respondent's Exhibit 21 and Respondent's Exhibit 22 and ask you to please look at those and, if you know, tell us what they are. A. They are statements made by men—

Q. Well, I will ask you who gave you those statements, if [1895] you know? A. Bill Runge handed me these statements.

Q. All right. And they are what kind of statements? What are they? A. They are written statements.

Q. Are those the ones that he returned to you after you had requested him to get certain information for you? A. Yes.

* * *

[1896] Q. After you received these statements what did you do? A. I held a meeting in the main office on October the 15th about five o'clock with W. H. Runge, Sr., W. P. Harrison, Sr. and R. M. Gardner.

Q. What happened at that meeting, Mr. King? A. We went over the matter of thirteen individuals. I showed the statements that I had received on the 13th and the 14th and I also told them of oral statements made by Dison, Bill Kinser, J. M. Green and also facts on the nine hand polishers and also reviewed the statements made by eight hand polishers and Charles Adair on October the 11th and after carefully considering the matter we decided that in the case of the individual hand polishers that Jake Teel, a hand polisher, we would return to work the next morning with pay and with seniority as we believed what he said when he said that he would have returned to work on the afternoon work period of October the 3rd if his wife had not been ill.

In the case of seven hand polishers, Jake Adair, Hendricks Adair, W. K. Hosey, B. C. Hosey, Charles Watkins, Bob Lovett and Eddie Houser, we would let them go back to work the next morning without pay but with full seniority.

In the case of Aubrey Ellison we decided we would fire him; that he would stay fired; that he by his own statement on October 11th said that he could have prevented the walkout if Warren had come to him and, also, that he and other [1897] men were responsible for the total work stoppage of operations on October the 6th.

We also decided in the cases of W. A. Adams, W. A. Wilson, Cecil Kinser and Charles T. Adair we would fire them the next morning for having caused the complete work stoppage on October the 6th; that they had fomented and incited the walkout; that they had ordered men off of their jobs and had ordered machinery shut down.

We further decided that when we went into the meeting at 7:30 that evening we would tell Mr. Mitchell and the committeemen of our position on Teel and the seven polishers as separate from that in the case of Aubrey Ellison. That when we told Mr. Mitchell of the case of Aubrey Ellison we would also tell him that we were going to fire Walter Adams, W. A. Wilson, Charles T. Adair and Cecil Kinser.

* * *

[1904] Q. Now, then, following this meeting on October the 15th, 1947 what did you do, if anything, in connection with W. A. Adams, W. A. Wilson, Charles T. Adair and Cecil Kinser? A. We fired them at work time on October the 16th. We gave them their envelope con-

taining their pay and also a separa- [1905] tion notice on which we stated why they were fired.

• • •

[1948] Cross Examination.

• • •

[1964] Q. When did you first start trying to get the information about how this work stoppage was caused? A. The latter part of the week of October the 6th.

Q. And had you decided before that time to make an effort to investigate and get the information? A. I had not decided. I was very, very busy due to the strike, to the strike of the hand polishers and the strike of October the 6th and practically my whole time and thought was taken up in the detail work of getting it arranged and getting [1965] the plant back into production.

Q. Well, then, you did not know on October 6th, at the time you had the meeting, that you were going to discharge anybody because of their participation in the strike? A. That thought didn't occur to me at that time.

Q. Well, had that thought occurred to you at the time of the meeting of October 11th? A. Yes.

Q. And at that time had you definitely decided to try to ascertain who caused the strike and to discharge them? A. That is right.

Q. And did you at that time make that decision known to the committeemen or any other representative of the union? A. I did not.

• • •

[1967] Re-direct Examination.

• • •

[1981] Q. (By Trial Examiner FEILER) Do you recall your testimony about meeting with the other directors on October 15th to discuss your reports on the work stoppage on October 6th? Do you remember that? A. Yes, sir.

Q. And I think you testified that at the conclusion of the board of directors' meeting you stated that you thought it best to at the meeting that evening state the company's position on Ellison and not mention the other four. Do you remember your testimony on that? A. Yes, sir.

Q. Why was it agreed to postpone announcing the decision on those four until the next day? A. Because everybody was pretty well heated up over it and I thought the best thing would be to drop it.

• • •

Board Counsel's Exhibit 2

FORM BESN-1 (revised-1-44)
UC-BT-101 revised

SEPARATION NOTICE

#4

Date last worked 10-16-47 Name of worker CHARLES T. ADAIR Social Security Number 416-03-0829

NOTE: A Separation Notice is Required Within 24 Hours After a Worker is Separated Regardless of the Reason of Separation. The worker named above was separated from our employ for the reason indicated by check mark (✓) below:

1. ☐ NO WORK AVAILABLE

GIVE FULL EXPLANATION

2. ☐ Quit work voluntarily without good cause connected with his work.
3. ☐ Discharged for dishonesty connected with his work.
4. ☐ Discharged because of a criminal act in connection with his work.
5. ☐ Discharged for an act endangering the safety of others in connection with his work.
6. ☐ Discharged for actual or threatened deliberate misconduct connected with his work.
7. ☒ Other reason.

IMPORTANT. If the worker was separated for any reason other than No Work Available, full explanation is to be given below:

Caused or provoked a complete work stoppage in production operations of the Company on Monday morning, October 6, 194[illegible] in disregard of welfare of fellow workers and interest of Company, and in violation of contract between Company and Union.

The worker has received, or will receive Separation Pay—Yes☐ No☐ The worker will receive a pension under an Employee Pension Plan—Yes☐ No☐ (If either is "Yes," explain below:

Explanation:

Amount $	From	Through

Prepare This Form in Triplicate—Distribute as Follows:
Mail the Original (white) to the:
ALABAMA UNEMPLOYMENT COMPENSATION AGENCY
Department of Industrial Relations
Montgomery 3, Alabama
Give or mail the Duplicate (pink) to the worker.
Retain Triplicate (blue) for your files.

EMPLOYER NAME, ADDRESS AND STATE REGISTRATION NUMBER
Alabama Marble Company
Gantts Quarry, Ala.

I certify that the facts stated above are correct.

By _____ Signature of official

Date prepared Oct.16,1947 Title Asst.Gen. Mgr.

Excerpts From General Counsel's Exhibit 6

THIS AGREEMENT made and entered into this 7th day of November 1946, By and between ALABAMA MARBLE COMPANY, a Corporation of Gantt's Quarry, Alabama, hereinafter referred to as the COMPANY, and INTERNATIONAL ASSOCIATION of MARBLE, SLATE & STONE POLISHERS, RUBBERS & SAWYERS, TILE & MARBLE SETTERS HELPERS, and TERRAZZO WORKERS HELPERS, A. F. of L., a Labor Organization officially certified by the National Labor Relations Board, and acting for and on behalf of Local No. 133, hereinafter referred to as the Union:

RECOGNITION:

SECTION 1: The Company hereby recognizes the Union as the sole collective Bargaining Agency, with respect to rates of pay, wages, hours, and other conditions of employment of its employees, with exception of supervisory employees, clerical employees, and draftsmen, employed in the Quarries and Plant of the Company at Gantt's Quarry, Alabama.

A. The Union agrees that the Company is vested exclusively with the management of the business, including the right to plan and direct all Plant operations; the right to establish, change or introduce new or improved production methods, standards and facilities; the right to hire new employees, to promote, demote, transfer, discipline, and discharge for just cause.

B. It is mutually agreed that there shall be no discrimination by the Company, nor by the Union, against any member of official of the Union, or against any employee of the Company, because of his membership in the Union.

C. It is mutually agreed that, during the term of this Agreement, there shall be no lock-out by the Company, nor shall there be any slow-down or work-stoppage by the Union until after all the provisions of the grievance procedure have been complied with.

• • •

Excerpts From General Counsel's Exhibit 6

ARTICLE 5

Grievance Procedure:

A. The Company will recognize a Grievance Committee of not more than five (5) employees, or less than two (2) employees duly elected by the Union to settle grievances

that may arise during the life of this Agreement. A list of said committee will be given to the Company and twenty-four (24) hours' notice must be given of any changes in the committee.

B. An attempt will be made by both parties to expedite the settlement of all grievances that may arise, and not more than five (5) days' time will be used to render a written decision on any case in any of the following steps, with the exception of when any case goes to arbitration as set out below:

Step One: All grievances shall be presented in writing to the Foreman of the department involved by the Union Shop Steward and signed by the aggrieved employee.

Step Two: Between the grievance committee and the superintendent of the plant.

Step Three: Between the Union Committee, representatives of the International Union, or the American Federation of Labor, and representatives of the Company.

Step Four: In the event that any dispute, except wages and classifications which are not subjects for arbitration, cannot be settled in the above manner, the Company shall designate one person and the Union shall designate one person and these two persons shall select a third person who shall act as chairman. In the event that the third person cannot be agreed upon in two days, then a third person shall be selected by the two persons from a list of arbitrators furnished by the Director of U. S. Conciliation Service, and such arbitration board will hear evidence and make a decision on the disputed matter. Such decision will be made and rendered within ten (10) days and shall be final and binding on both parties. The expense for the third member of the arbitration board shall be borne equally by the Company and the Union.

* * *

Respondent's Exhibit 18

October 13, 1947

I, (s) C. W. O'Neal, hereby certify that the following is true:

On Monday, October 6, 1947, I was working at the Quarry. My job is that of Broach Help. I saw W. A. Adams motion for the men to come out of the Quarry. I came out of the Quarry and was told by that to go to polishing shop to see what was going to be done—told to clock out.

I would not have come out of the Quarry or left my job on my own accord or without such instructions.

Dated October 13, 1947.

(s) C. W. O'Neal

(S) W. C. Kinser

Respondent's Exhibit 19

October 13, 1947

I, A. J. Carden, hereby certify that the following is true:

On Monday, October 6, 1947, I was working in the Quarry. My job is that of Mach Operator. I saw C. M. Kinser motion for the men to come out of the Quarry. I came out of the Quarry and was told by him that we would haft to clock out, until this is settled.

I would not have come out of the Quarry or left my job on my own accord or without such instructions.

Dated October 13, 1947

(s) A. J. Carden

(S) W. C. Kinser

Respondent's Exhibit 20

October 14, 1947

I, E. I. Dison, Hereby certify that the following statements are true:

On Monday, October 6, 1947, I was going about my work in the Finishing Plant. My job is that of foreman of the Coping and Bed Rubbing Department. Charles Adair came to me and told me that I would have to shut the Rubbing Beds down. I refused to do so as Charles Adair is only a checker and has no authority to issue such orders. Charles Adair left and in a few minutes approximately twenty-five men from the Hand Polishing and Boxing Area in which Charles Adair is a Checker started gathering around the Rubbing beds. At this time A. F. Ellision came to me and told me that I would have to shut down the Beds. I then ordered my men to shut down the machinery. My orders were given only to avoid possible trouble.

Dated October 13, 1947.

(s) E. I. Dison

E. I. Dison

(Seal)
(s) W. C. HURT
Notary Public
Talladega Co. Alabama.

Respondent's Exhibit 21

I, W. C. KINSER, certify that the following statements are true:

On Monday morning, October 6, 1947, while carrying out my duties as Quarry Foreman I heard Cecil M. Kinser direct W. A. Adams to call out the men in the south end of the quarry. W. A. Adams as a result of these instructions left in the direction of the south end of the quarry. Shortly thereafter the men began to come out of the south end of the quarry.

Dated October 13, 1947.

(s) W. C. KINSER

W. C. HURT
(seal) Notary Public
Talladega, County, Ala.

Respondent's Exhibit 22

October 13, 1947

I. J. W. GREEN, hereby certify that the following is true:

On Monday, October 6, 1947, I was working in the Mill. My job is that of Sawyer. W. A. (Aud) Wilson came to me and told me to shut down the gang saws.

I then did shut down the gang saws because of the instructions given by W. A. Wilson. I would not have done such on my own accord or without such instructions.

Dated October 13, 1947.

(s) J. W. GREEN X his mark
J. W. Green

(S) W. E. SORRELL Mill Foreman
(S) D. A. MCCLUSKEY Yard Foreman

☆U. S. GOVERNMENT PRINTING OFFICE: 872870 NO. 17....1950

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 140

ALABAMA MARBLE COMPANY, A CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court below (R. 287),[1] is reported at 185 F. 2d 1022. The findings of fact, conclusions of law, and order of the

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[1] The symbol "R" refers to the transcript of record; the symbol "B.A." refers to the appendix to the brief filed by the Board in the court below.

Board (R. 125-221, 252-257), are reported at 83 NLRB 1047.

JURISDICTION

The judgment of the court below was entered on January 22, 1951 (R. 288), and a petition for rehearing was denied on May 4, 1951 (R. 301). A final decree was entered May 25, 1951 (R. 301). The petition for a writ of certiorari was filed on June 23, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the record supports the Board's finding that the strike settlement agreement provided for the return to work of all strikers.

2. If so, whether petitioner, having agreed that all strikers could return to work, was precluded from urging the unprotected character of the strike as a ground for its discharge of the strike leaders over a week after work had been resumed under the strike settlement agreement, so that the discharges violated Section 8 (a) (1) and (3) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 18-23.

STATEMENT

A. *The facts found by the Board*

Upon charges filed by Adair, Wilson, Adams, and Kinser, sometimes referred to here as complainants, and upon the usual proceedings under Section 10 of the Act, the Board found that petitioner, which is engaged in the quarrying and processing of marble at Gault's Quarry, Alabama, had violated Section 8 (a) (1) and (3) of the Act by discharging complainants on October 16, 1947, because of their participation in a work stoppage called ten days before to protest the discharge of fellow employees. The facts found by the Board may be summarized as follows:

A contract between petitioner and the Union representing its employees[2] contained a no-strike clause and a provision for submitting disputes to arbitration (B. A. 33-34). Nevertheless, the discharge of nine hand polishers, employed in petitioner's finishing plant, on the morning of Monday, October 6, 1947, resulted in a strike by the employees (R. 144; B. A. 6). The employees who stopped work to protest the discharges were led by Adair, Wilson, Adams, and Kinser (R. 142 144; B. A. 4-5, 7-8, 12-13). General Manager King was at or near the plant during the entire day but made no effort to get the men back to work (R. 144;

[2] Local 133, International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Workers Helpers, A.F.L., herein called the Union.

B. A. 26). However, at the request of Adair, secretary-treasurer of the Union, Mitchell, an A.F.L. representative, arrived at the plant in the late afternoon accompanied by Finch, a representative of the Federal Mediation and Conciliation Service (R. 141, 144; B. A. 3, 13, 14, 18). At Finch's request, King agreed to meet with Mitchell (B. A. 26).

That evening, at a meeting of Company and Union officials including complainants Kinser, Adams, and Wilson, the parties had no difficulty reaching an agreement with respect to all employees but the nine discharged hand polishers (R. 144-145; B. A. 15-16, 27-28). Mitchell initially proposed the return to work of all employees, including the hand polishers (R. 144-145; B. A. 15). But King refused to permit the hand polishers to return to work, proposing instead to take their cases directly to arbitration (R. 144-145; B. A. 15, 27). Mitchell then asked King "if the other men could go back to work the next morning," and King replied that they could (R. 144-145; B. A. 27). Mitchell thereupon dropped his efforts to obtain the immediate return to work of the hand polishers, but persuaded King to handle their cases as grievances (R. 144-145; B. A. 15, 27-28). They agreed upon the following Saturday, October 11, 1947, as the date for the first grievance meeting (*ibid.*). King remained in the sales office while the Union negotiators reported back to the men

(B. A. 28). King testified that "about half past eight Cecil Kinser came into the office and said the men would go back to work in the morning. I said, 'all right' " (*ibid.*).

Pursuant to the strike settlement all employees except the hand-polishers returned to work on Tuesday, October 7 (R. 150; B. A. 28). Toward the end of that week, however, King decided to discharge the complainants, who had been the leaders in the October 6 strike (R. 148; B. A. 32). King admitted that the thought of discharging anyone for participation in the work stoppage had not occurred to him at the strike settlement meeting; he did not explain why he had changed his mind (*ibid.*). His decision to discharge the strike leaders was approved at a meeting of petitioner's directors held on Wednesday evening, October 15, 1947 (R. 147; B. A. 31).

The next morning, Kinser, Adams, Adair, and Wilson were discharged (R. 146; B. A. 31-32). Each man received a separation notice charging him with having "caused or provoked" the strike "in disregard of welfare of fellow workers and interest of Company" and in violation of contract (R. 146; B. A. 5-6, 32).

Petitioner, prior to giving the complainants notice of their discharge, had not indicated any intention to discipline the strike leaders or other participants in the work stoppage (R. 147-148; B. A. 32). On the contrary, petitioner had made it clear

that all the men could return to work except the discharged hand-polishers (B. A. 27), and, as noted above, all the men resumed work the day following the strike. Petitioner contended before the Board, however, that it had failed to take earlier action against the strike leaders because it was not aware of their identity. The Board noted that petitioner, when it permitted the strikers to return to work, had not reserved the right to discharge the strike leaders upon ascertaining who they were (R. 127). In addition, the Board, upon the following evidence, found as a fact that petitioner through its foremen had actual knowledge at the time of the strike of the roles played by Adair, Kinser, Adams, and Wilson as strike leaders (*ibid.*):

The work stoppage on October 6 originated in respondent's finishing plant and quickly spread to its quarry and sawmill.[3] Foreman Warren of the finishing department, shortly before starting time, notified Union Secretary Adair that the hand polishers had been discharged (R. 142; B. A. 3).[4]

[3] The finishing plant and sawmill are about one-half mile distant from the quarry (B. A. 7). Wilson, a millwright, worked at the sawmill (R. 143; B. A. 11); Adair worked as a checker and inspector in the finishing plant (R. 142; B. A. 2); Kinser operated a derrick at the quarry (R. 143; B. A. 7); and Adams worked at a blacksmith shop located near the quarry (B. A. 12).

[4] The hand-polishers had been discharged at the direction of King because they had absented themselves from work to listen to a broadcast of a World Series baseball game (R. 141-142; B. A. 22-23). At their meeting on October 15, petitioner's directors decided to offer reinstatement to all the hand-polishers except Union Committeeman Aubrey Ellison (R. 145, 147; B. A. 30-31). The Union rejected this offer when it met with petitioner later that same evening, and the parties finally agreed to

The finishing department employees began to gather as word of the discharges reached them and decided not to work until "something [was] done" about the discharges (R. 142; B. A. 4). Adair completed the work stoppage at the finishing plant by instructing Foreman Dison to shut down certain production operations (R. 256; B. A. 21).

The sawmill employees voiced approval of the work stoppage when Committeeman Wilson, who had been summoned to the finishing plant by Adair, reported back that no one was working at the plant (R. 143-144; B. A. 4, 11-12). Wilson thereupon proceeded to tell the employees who work in the sawmill to shut down operations (R. 144, 256; B. A. 12, 19, 36). He then returned to the finishing plant and joined Committeemen Kirk, Robinson, and Ellison in a decision to call a complete work stoppage (R. 142, 143; B. A. 8-9).

Union President C. M. Kinser left his place of work in the quarry when told by another employee that there was trouble in the finishing department (R. 143; B. A. 7). Upon his arrival at the finishing plant, Kinser spoke to the committeemen, and learned of their decision to call a work stoppage (R. 143; B. A. 8-9). Kinser then called upon the

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refer the matter to arbitration (R. 145-146; B. A. 17). The evidence is conflicting as to whether the arbitrators named on October 22 to consider the case of the hand-polishers were also instructed to consider the case of the discharged strike leaders (R. 148; B. A. 17-19, 23-24). In any event, the Union did not attempt to complete arbitration when the arbitrator named by it became ill a few days before its contract with petitioner expired (R. 148; B. A. 24-25).

men present, constituting a majority of the Union membership, to vote on a motion that the quarry be shut down. The motion was carried (R. 143; B. A. 8-9).

Kinser called the men out of the quarry with the help of Committeeman Adams (R. 143; B. A. 8, 10, 12-13), who was given his instructions in the presence of Quarry Foreman W. C. Kinser[5] (R. 255; B. A. 19-20). Kinser also countermanded the Foreman's directions to the men not to "clock out" (R. 255-256; B. A. 20).

Thus, as the Board found (R. 127, 255-257), Foreman W. C. Kinser was aware at the time of the strike of the role played by Adams and C. M. Kinser in the quarry shut-down; Foreman Dison was similarly aware of Adair's role in the stoppage at the finishing plant; and Wilson's role in shutting down the sawmill was a matter of common knowledge.

B. *The Board's decision and order*

The Board found that petitioner discharged Adair, Wilson, Adams, and Kinser "because of their participation in the work stoppage of October 6, 1947; and that, although the work stoppage was in breach of a no-strike clause contained in an existing contract, the [petitioner] waived or condoned such conduct by permitting them to return to

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[5] Union President C. M. Kinser and Foreman W. C. Kinser are brothers (B. A. 20).

work" (R. 126-127). The Board rejected petitioner's contention that there was no waiver because it did not know at the time of the strike settlement of the role played by the four Union officials in the work stoppage, stating that petitioner knew that the employees had engaged in a work stoppage in breach of contract, but agreed nevertheless "to permit all employees to return to work without stipulating that it reserved to itself the privilege of disciplining any participant in the work stoppage" (R. 127). The Board also found that, in any event, petitioner's foremen "had personal knowledge of the part played by the four union officers in the work stoppage at the time it occurred," and attributed such knowledge to petitioner (*ibid.*).[6]

Further finding that "the conduct of the four union officers in instigating or sponsoring the work stoppage of October 6, constituted union, as well as concerted, activity within the meaning of the Act," the Board concluded that, by discharging com-

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[6] Petitioner filed with the Board a petition for reconsideration in which it asserted, *inter alia*, that the Union at the strike settlement meeting had reserved to petitioner the right to investigate the work stoppage and "discharge any individual employee on the basis of the information gathered." Petitioner also asserted that its foremen did not have knowledge of complainants' strike role (R. 221-232). Upon an examination of the record citations submitted by petitioner at the Board's request (R. 241-251) and upon the entire record in the case, the Board concluded that petitioner's assertions were without factual basis (R. 254). On October 21, 1949, the Board denied a further motion by petitioner for reconsideration of the Board's decision and for reopening the record to take further testimony (R. 285-286).

plainants on October 16, 1947, and thereafter refusing to reinstate them, petitioner violated Section 8 (a) (3) of the Act, which prohibits discouraging membership in a labor organization by discriminatory discharge for activity on its behalf, and also violated Section 8 (a) (1) of the Act, which prohibits interfering with, restraining, or coercing employees for engaging in concerted activity for mutual aid and protection (R. 127).

The Board's order requires petitioner to cease and desist from discriminating against its employees in order to discourage membership in the Union or any other labor organization of its employees, or in any manner interfering with, restraining or coercing its employees in the exercise of their rights under the Act; to offer Adair, Wilson, Adams, and Kinser, reinstatement with back pay; and to post an appropriate notice (R. 130-132).

ARGUMENT

1. The facts found by the Board establish that the strike settlement agreement provided for the reinstatement of all the strikers. The Board found that all the strikers did in fact resume work over a week before the discharges; that petitioner expressed no reservation as to the return of all the strikers; and that petitioner through its foremen was aware from the outset of the identity of the strike leaders. It is clear that these findings are

amply supported by the record. In any event, "granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; see also *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 491.[7]

2. Equally inappropriate for review by this Court is the single material issue involved in the thirty questions presented by the petition for certiorari.[8] For the holding that petitioner, having condoned the breach of contract in settling the strike, could not thereafter assert the illegality of

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[7] The decision of the court below was rendered prior to this Court's decision in the *Universal Camera* case. The court below apparently was of the view, however, that the Board's findings in the instant case were beyond question under the *Universal Camera* rule. The same panel of judges which sat in the instant case also heard *National Labor Relations Board* v. *Russell Mfg. Co.*, 187 F. 2d 296, argued the same day as the case at bar, and likewise decided prior to *Universal Camera*. In *Russell* the court on its own motion directed the filing of new briefs devoted to the effect of the *Universal Camera* decision on the findings in that case. 187 F. 2d 336. No similar order was entered in this case.

[8] As we believe is apparent from the facts and the Board's decision and from the petition for certiorari itself, most of the questions petitioner states (Pet. 22-29) are either redundant or irrelevant. For example, petitioner's questions 1, 5, 6, and 9 go to the originally unprotected character of the strike, which is conceded. Questions 2 and 7 raise an issue as to whether the Union refused to bargain in violation of Section 8 (b) (3); no such charge was ever filed against the Union or litigated in this proceeding, and in any event, the Union's refusal to bargain could not justify the discriminatory discharge of the employees. The question (No. 13) whether the Board must prove the Union's compliance with Section 9 (f), (g), and (h), on which this Court recently denied certiorari in *Red Rock Cola Co.* v. *National Labor Relations Board*, No. 695, October Term, 1950, is not presented here since the complaint rests upon charges filed by the individual employees and not by the Union.

the strike as a ground for discharging the Union leaders is clearly correct and—contrary to petitioner's several unsupported assertions of supposed conflicts (Pet. 30-33)—reflects the uniform position of the Board and the courts of appeals.

The courts have consistently sustained the Board's view that where employees engage in normally protected concerted activities which are in some respect unlawful (for example, a strike in breach of contract, as in the instant case), if the employer condones the unlawful aspect of the employees' conduct by resuming or continuing their employment, he waives the right to rely on that unlawful aspect as justifying a subsequent discharge for the concerted activities. The employees' conduct must thereafter be regarded as ordinary protected union or concerted activity, and a discharge therefor violates Section 8 (a) (1) and (3) of the Act. Where the employer continues "to treat the strikers as its employees,"[9] where "no question concerning the status of such employees" is raised,[10] where employees are "invited * * * to return to their old places, regardless of the [wrongful] strike,"[11] where the "breach [of agreement]

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[9] *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 886 (C. A. 1), certiorari denied, 313 U. S. 595.

[10] *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. 2d 849, 856 (C. A. 7), certiorari denied, 312 U. S. 680.

[11] *National Labor Relations Board* v. *Aladdin Industries*, 125 F. 2d 377, 382 (C. A. 7), certiorari denied, 316 U. S. 706.

was overlooked" [12]—where, in short, the parties have "wiped the slate clean" by agreeing to settle their dispute [13]—the employer may not revive the wrong he has condoned to excuse later discriminations. See also *National Labor Relations Board* v. *Mt. Clemens Pottery Co.*, 147 F. 2d 262, 267 C. A. 6); *Hoover Co.* v. *National Labor Relations Board* (C. A. 6, No. 11223), decided July 9, 1951, slip op. p. 18.

The principle of condonation, consistently followed by the Board and the courts of appeals, was applied by Congress in Section 8 (d) of the amended Act. There Congress provided that an employee who strikes during the 60-day waiting period contemplated by the subsection "shall lose his status as an employee of the employer engaged in the particular labor dispute," but that "such loss of status for such employee shall terminate if and when he is reemployed by such employer." The latter clause, under which reemployment terminates the employer's power to discharge employees for striking in violation of the statutory provision, embodies the same approach which the Board and the courts have applied to other types of illegal strikes such as sit-down strikes and strikes in breach of contract, as in the instant case.[14] No

[12] *Hazel-Atlas Glass Company* v. *National Labor Relations Board*, 127 F. 2d 109, 118 (C. A. 4).

[13] *National Labor Relations Board* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885, 887 (C. A. 2).

[14] Condonation being absent, the privilege of an employer to discharge or replace employees for striking in breach of con-

statutory addendum would have been necessary to affirm the obvious proposition that reemployment, like initial employment, creates the protected status of "employee" for the future; the explicit provision that any prior "loss of status * * * shall terminate" can only mean that reemployment puts an end to the time for allowable reprisals inflicted for past activities. Thus, Congress not only reenacted the provisions of the Act under which the Board had evolved its settled doctrine of condonation [15] (cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365-366); going further, Congress itself utilized the doctrine so that an employee's loss of protected status for engaging in a strike denounced as wrongful by the Act itself persists only "unless and until he is reemployed." S. Rep. No. 105, 80th Cong., 1st Sess., p. 24.

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tract, *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, has been upheld by the Board as a matter of course. *Scullin Steel Co.*, 65 NLRB 1294; *Joseph Dyson & Sons, Inc.*, 72 NLRB 445; *Fafnir Bearing Co.*, 73 NLRB 1008; *Copperweld Steel Co.*, 75 NLRB 188; *National Electric Products Corp.*, 80 NLRB 995. Petitioner's contention (Pet. 31) that the Board's finding of condonation in this case is inconsistent with its decision in the *National Electric Products* case is unfounded. In that case, a few employees who had struck in breach of contract were not disciplined for several days after their return to work. Unlike the present case, however, the return to work of the strikers in the *National Electric Products* case was not negotiated as part of a strike settlement, nor had the employer invited them back to work or otherwise indicated any intention to waive its privilege to discipline them for their breach of contract.

[15] Sections 1 and 8(a) (1) and (3) of the amended Act effect no presently material changes in Sections 1 and 8 (1) and (3) of the original Act.

Compelling policy considerations underlie the view of Congress, the courts of appeals, and the Board that a resumption of peaceful employment relationships should conclude the employer's right to exact penalties for past concerted activities. Section 1 of the Act announces the legislative objective to promote "practices fundamental to the friendly adjustment of industrial disputes," an objective which has led the Board from its earliest days to encourage compromise and settlement.[16] Since settlement agreements facilitate the "rapid removal" of labor disputes "from the area of possible industrial conflict" (National Labor Relations Board, First Annual Report (1936), p. 31), public policy requires the maintenance of confidence in their efficacy. Hence, where the employer enters into an agreement compromising or settling unfair labor practices, it is the Board's practice to dismiss unfair labor practice charges based on matters encompassed by the agreement.[17] The same

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[16] The substitution of amicable adjustment of disputes for formal action by the Board has become a matter of major importance in the administration of the Act. During the fiscal years 1936-1947, of 43,556 cases involving unfair labor practices, 16,323, or better than 37.4 percent, were settled before formal action. During the same period, of 57,852 cases involving representation issues, 28,161 or more than 48.7 percent, were adjusted without formal action. National Labor Relations Board, Twelfth Annual Report (1947), pp. 86-87.

[17] See, *e.g.*, *American Bakeries Co.*, 51 NLRB 937; *Corn Products Refining Co.*, 22 NLRB 824; *Wickwire Brothers*, 16 NLRB 316; *Shenandoah-Dives Mining Co.*, 11 NLRB 885. If the employer thereafter continues to violate the Act, the Board, notwithstanding the agreement, will hold him to account for all unfair labor practices committed. See, *e.g.*, *May Depart-*

policy requires that where an employer settles a strike by agreeing to the reinstatement of all the strikers in return for their abandonment of the objectives of the strike, he must abide by his agreement and cannot thereafter urge the illegality of the strike as a basis for their discharge.[18]

The *per curiam* decision below, in granting enforcement of the Board's order, plainly effectuates the policy favoring peaceful and conclusive adjustment of labor disputes. Even if the doctrine reaffirmed in this case were less obviously consonant with the Act's general objectives, its propriety would be amply demonstrated by Congress' utilization of the same policy in Section 8 (d) of the amended Act and by the uniform holdings of the other courts of appeals which have con-

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ment Stores Co., 59 NLRB 976; *Chicago Casket Co.*, 21 NLRB 235; *Harry A. Halff*, 16 NLRB 667. The Board's practice in this respect has been expressly approved by this Court. *Wallace Corporation* v. *National Labor Relations Board*, 323 U. S. 248, 253-255.

[18] Compare the doctrine developed in the common law of master and servant that where "a person is continued in employment after a material breach of contract is fully known to the employer, a waiver and condonation is presumed by the law, and such breach cannot subsequently be relied upon as sufficient cause for the discharge of the employee." *Jones* v. *Vestry of Trinity Parish*, 19 Fed. 59, 62 (C. C. W. D. N. C.); see also, *In re Nagel*, 278 Fed. 105, 110 (C. A. 2); *Remington Typewriter Co.* v. *Hall*, 22 Ala. App. 267, certiorari denied, 217 Ala. 128; *Perkins* v. *Gillett Warehouse Co.*, 149 Ark. 253; *Dube* v. *Simard*, 124 Me. 369; *Daniell* v. *Boston & Maine Railroad*, 184 Mass. 337; *Rubin* v. *International Film Co.*, 122 Misc. 413, 204 N. Y. Supp. 81; *Elliott-Greer Office Supply Co.* v. *Martin*, 54 S. W. 2d 1068 (Tex. Civ. App.); 3 Williston on Contracts, § 725 (Rev. ed.).

sidered it. We submit, therefore, that review by this Court is not warranted.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1951.

APPENDIX

The relevant provisions of the National Labor Act, as amended (61 Stat. 136, 29 U.S.C. Supp. III, Secs. 151, *et seq.*), are as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminuation of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and the employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the

thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) of such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if

requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given

or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

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